

Based upon the record as it currently exists, the Appeals Board finds the preliminary hearing Order should be reversed and benefits denied.

(1) The Appeals Board finds that claimant has not met her burden of proving that she sustained personal injury by accident arising out of and in the course of her employment with respondent.

Claimant described her work with respondent as supervisor of the appliances department as requiring her to not only train and supervise other employees, but also to do cleanup activities and move appliances. She also described how her left foot was injured twice on September 30, 1997; first, when the wheels of a moveable ladder ran over her foot and second, when a washing machine she was moving tipped and landed on her foot.

Respondent points to several inconsistencies in the record in support of its position that the injury is not work related. The primary inconsistency respondent points to is the September 30, 1997 entry in Dr. Mitchell's office chart that indicates claimant had already been off work one week because of left foot swelling. But the inconsistencies in claimant's testimony are not limited to the date on which these incidents occurred. Claimant initially told Dr. Mitchell that she did not recall any injury to her foot. Only later did she recall the incidents she now describes even though she initially saw Dr. Mitchell on the same day she claims she was injured. Also, although claimant denied prior foot problems, a patient note by Dr. Summerhouse shows claimant was examined for a swollen and painful left foot on July 28, 1997.

The Judge had the opportunity to personally observe claimant testify and assess her demeanor and credibility. Generally, the Appeals Board gives deference to the Administrative Law Judge's determination of claimant's credibility. In this instance however, the greater weight of the evidence does not support claimant's contention that her foot condition was caused by the two alleged work-related accidents on September 30, 1997.

(2) The Appeals Board finds that claimant has failed to prove that she provided respondent with timely notice of accidental injury.

Claimant testified that she advised her supervisor on October 2, 1997 of her September 30, 1997 injury, before she went to her personal physician, Dr. Mitchell, on October 7, 1997. That testimony is likewise controverted by the medical records because although claimant testified that she first saw Dr. Mitchell on October 7, 1997, one week after her accidents, his records show he first saw claimant on September 30, 1997.

Claimant has made no attempt to amend her claim to allege a different accident date even though, in her brief, claimant concedes that there is some evidence to suggest her accidents occurred on September 23, 1997 rather than on September 30, 1997. Instead claimant contends that either way, her October 2, 1997 notice of injury satisfies the statute because it was given to her supervisor within 10 days of the accidents. This ignores the language of the statute that notice of the accident include "the time and place

and particulars thereof." K.S.A. 44-520. This alone might not be sufficient grounds to deny the claim but the confusion and contradictions concerning claimant's accident date also call into question her testimony concerning whether she spoke with her supervisor on October 2, 1997 about her injury.

(3) The issue of whether the Administrative Law Judge exceeded his authority in granting benefits is not one that the Appeals Board has the jurisdiction to address at this juncture of the proceeding.

This issue was raised in respondent's Request for Board Review but was not briefed. The Appeals Board, therefore, is unable to determine the specific objection respondent has concerning the Judge's jurisdiction. If respondent is restating its objections to whether claimant proved accident arising out of and in the course of employment and whether claimant provided timely notice, those issues have been addressed. But if respondent is raising an issue concerning the Judge's determination that claimant is temporarily and totally disabled and is in need of medical treatment, then the Appeals Board lacks jurisdiction to review those findings.

The Act provides that the Appeals Board can review preliminary hearing orders when the administrative law judge has exceeded his or her jurisdiction. See K.S.A. 1997 Supp. 44-551(b)(2)(A). But under the preliminary hearing statute, the judge has the authority to decide whether a worker is temporarily and totally disabled and issues concerning the furnishing of medical treatment. Therefore, the Judge did not exceed his jurisdiction.

The Act also provides for Appeals Board review of preliminary hearings when there is a dispute concerning the jurisdictional issues set forth in K.S.A. 1997 Supp. 44-534a:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Was notice and claim timely?
- (4) Do certain defenses apply?

The issues of whether claimant is temporarily and totally disabled or is in need of medical treatment are not jurisdictional issues. Nevertheless, temporary total disability compensation and medical benefits must be denied because claimant has failed to prove she suffered injury by accident arising out of and in the course of her employment with respondent and that she provided respondent with timely notice.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated February 17, 1998 entered by Administrative Law Judge John D. Clark is reversed.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS
Lawrence D. Greenbaum, Kansas City, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director